FILE COPY

Office - Supreme Court, U. S.
FILED
OCT 21 1947
CHARLES ELMORE CROPLEY

No. 411

Supreme Court of the United States

OCTOBER TERM, 1947.

JAMES M. GORDON, *Petitioner*,

v.

KENYON J. SCUDDER, Superintendent of the California Institute for Men Located at Chino, California.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

DAVID W. LOUISELL,
Washington, D. C.
Counsel for Petitioner.

SPENCER & LOUISELL
Washington, D. C.
Of Counsel.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX.

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Constitutional provisions and statutes involved	3
Statement	3
A. The present proceeding	3
B. Previous history of the litigation	4
C. The invalidity under the Fourteenth Amendment of petitioner's imprisonment	6
D. Action of the courts below	7
Specification of errors to be urged	8
Reasons for granting the writ of certiorari	8
I. The circuit court of appeals has decided an important federal question in a way in conflict with applicable decisions of this Court	8
II. Constitution questions of grave importance are presented	10
A. California, in violation of the Fourteenth Amendment, denied petitioner his right of appeal	10
B. California otherwise violated the Fourteenth Amendment	13
Conclusion	15
Appendix	16
California constitutional provisions	16
Statutes—Penal code of California	17

CITATIONS.

CASES: Page

Barbier v. *Connolly*, 113 U. S. 27, 31 11
Boykin v. *Huff*, (App. D.C.) 121 F. (2d) 865, 872... 11
Cochran v. *Kansas*, 316 U.S. 255 .....11, 12
Connally v. *General Const. Co.*, 269 U.S. 385..... 13
Cramer v. *United States*, 325 U.S. 1, 36 13
Ex Parte Hawk, 321 U. S. 114, 117-118 7
Ex Parte Hickey, 3 Cal. App. (2d) 502, 39 P. (2d) 869 9
Ex Parte Mooney, 6 Cal. App. (2d) 730, 45 P. (2d) 388 9
Ex Parte Mooney, 10 Cal. (2d) 1, 73 P. (2d) 554.... 9
Ex Parte Murphy, 79 Cal. App. 64, 248 Pac. 1044... 9
Ex Parte Sharp, (D. C. Kansas) 33 Fed. Supp. 464 12
House v. *Mayo*, 324 U.S. 42 9
Hysler v. *Florida*, 315 U.S. 411, 413 14
Lanzetta v. *New Jersey*, 306 U.S. 451 13
Lynch v. *New York*, 293 U. S. 52, 54 9
Mooney v. *Holohan*, 294 U.S. 103..... 14
Moore v. *Dempsey*, 261 U.S. 86, 92..... 14
People v. *Gordon*, 71 Cal. App. (2d) 606, 163 P. (2d) 110 5
Potter v. *Dowd*, (C.C.A. 7) 146 F. (2d) 244 9
Smith v. *United States*, (C.C.A. 10) 145 F. (2d) 643, cert. denied 323 U. S. 803..... 14
Soon Hing v. *Crowley*, 113 U.S. 703, 708 12
State v. *Guerringer*, 265 Mo. 408, 416-417, 178 S.W. 65, 67 12
Stoutenburgh v. *Frazier*, 16 App. D.C. 229 13
Stromberg v. *California*, 283 U.S. 359 13
Sunday Lake Iron Co. v. *Wakefield*, 247 U.S. 350, 352 12
Utah Power & Light Co. v. *Pfost*, 286 U.S. 165, 190 12
White v. *Ragen*, 324 U.S. 760 9
Williams v. *Kaiser*, 323 U.S. 471, 473, 477..... 5
Williams v. *North Carolina*, 317 U.S. 287, 292..... 13
Woods v. *Nierstheimer*, 328 U.S. 211..... 9
Wuest v. *Wuest*, 53 Cal. App. (2d) 339, 345, 127 P. (2d) 934, 936 .....10, 12
Yick Wo v. *Hopkins*, 118 U. S. 356, 374 12

CONSTITUTIONAL PROVISIONS AND STATUTES: Page

California Constitution, Art. VI, Sec. 4 .....10, 16
California Constitution, Art. VI, Sec. 4b 10, 16
California Penal Code, Sec. 18a 14
Sec. 182 .....2, 4, 13, 14, 17-18
Sec. 484 13
Sec. 489 .....13, 18
Sec. 1237 .....10, 17

MISCELLANEOUS:

Brief for Petitioner in *Cochran* v. *Kansas*, 316 U.S. 255 12

Supreme Court of the United States

OCTOBER TERM, 1947.

No.

JAMES M. GORDON, *Petitioner*,

v.

KENYON J. SCUDDER, Superintendent of the California Institute for Men Located at Chino, California.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

OPINION BELOW

The order and the memorandum of conclusions of the district court (R. 88-98) are not officially reported. The opinion of the circuit court of appeals (R. 121-125) is not yet reported.

JURISDICTION

The judgment of the circuit court of appeals was entered August 26, 1947 (R. 126). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether a person confined by a state in violation of the Constitution of the United States who has duly petitioned the highest court of the state for a writ of habeas corpus and such court has denied the petition without opinion and without indicating its reason for denial must, to exhaust his state remedies, apply to this Court for a writ of certiorari before petitioning a United States district court for a writ of habeas corpus.

2. Whether, when a state provides for an absolute right of appeal in a criminal case to an intermediate appellate court, but provides for appeal to the highest state court only when the highest court orders that the case be transferred to it, and the highest court uniformly follows the rule that it will not go behind the statement of facts contained in the opinion of the intermediate court if such opinion contains a correct statement of the law based upon the facts related therein, the due process of law and the equal protection of the laws guaranteed by the Fourteenth Amendment are denied when the intermediate court in its opinion makes a palpable and patent misstatement of the facts appearing in the record, thereby precluding possibility of correction by the highest court and denying to a particular defendant the substance of review accorded generally by the state.

3. Whether Section 182 of the Penal Code of California as applied to petitioner is so vague, indefinite and uncertain as to deprive him of the due process of law and equal protection of the laws guaranteed him by the Fourteenth Amendment.

4. Whether, when the minimum and maximum sentence to which a defendant is subject varies depending upon the statutory clause on which his conviction is predicated, and it is impossible to determine from the proceedings which clause the conviction is predicated upon, it violates the due process of law and equal protection of the laws guaranteed

by the Fourteenth Amendment for the court to adjudge that defendant be punished by imprisonment "for the term prescribed by law", thus authorizing the Adult Authority, a non-judicial body, to assign a sentence specified by the statutory clause providing the most onerous minimum and maximum sentence.

5. Whether, under the circumstances of this case, petitioner was denied the due process of law guaranteed him by the Fourteenth Amendment in that evidence of purported crimes of which petitioner was not accused was admitted over petitioner's objection and was designed to prejudice and did prejudice the jury against petitioner.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The California constitutional provisions and statutes involved are set forth in the Appendix, *infra*, pp. 16-18.

STATEMENT

A. The Present Proceeding.

This case was initiated in the United States District Court, Southern District of California, by filing a petition for habeas corpus dated December 5, 1946 (R. 2-30). An order to show cause was issued (R. 87). On March 4, 1947, the district court entered an order discharging its order to show cause and denying the petition for habeas corpus (R. 93-97).[1] The respondent was not required to answer to the merits of the petition and the district court made no findings thereon (R. 88-97). Petitioner's application under 28 U. S. C. A. 466 for a certificate of probable cause for appeal to the circuit court of appeals was denied by the district judge on March 4, 1947 (R. 106), but was granted on March 13, 1947, by a Judge of the United States Circuit Court of

[1] Previously, on February 14, 1947, the district judge had filed a "Memorandum of Conclusions" as to why the petition for the writ should be denied (R. 88-92).

Appeals for the Ninth Circuit, the Honorable Albert Lee Stephens (R. 109-110), who recognized that there are " . . . legal points involved, and necessarily decided by, the District Court in the dismissal order that warrant a review by the Court duly constituted for such purpose" (R. 110). The circuit court of appeals affirmed the order of the district court on the ground that petitioner had not exhausted his state remedies, thus refusing to examine into the merits (R. 121-125).

B. Previous History of the Litigation.

Petitioner and Harry White were indicted on March 14, 1944, by the Los Angeles County Grand Jury and accused in Count One of conspiracy to cheat and defraud by criminal means, *and* to obtain money and property by false pretenses *and* by false promises with fraudulent intent not to perform such promises, *and* to commit grand theft.[2] In Counts Two to Eight inclusive, they were accused of the substantive offenses of grand theft. They were found guilty on all counts. White was placed on probation but petitioner under the name of "James Margolis" was sentenced to imprisonment in the state prison "for the term prescribed by law." The sentences on Counts Two to Eight inclusive were ordered to run concurrently but consecutively to the sentence on Count One[3] (R. 3-4, 17, 31-32).

Petitioner appealed to the California District Court of Appeal, which affirmed the convictions on all counts (R. 5,

---

[2] Count One was based on California Penal Code, Sec. 182, paragraphs 1 and 4, Appendix, *infra*, pp. 17-18. Count One is in the conjunctive; the offenses specified in the paragraphs of Sec. 182 involved are in the disjunctive. The verdict of the jury was general, finding petitioner guilty "as charged in Count 1" (R. 15). See *infra*, p. 13.

[3] The theory of the indictment and prosecution was that certain unimproved parcels of land in the San Joaquin Valley were sold by the use of false pretenses and false promises, the alleged false pretense being a representation that the land was potential oil land. The land was authorized to be sold as potential oil land by the Real Estate Commissioner of California, who issued a permit allowing such sales to the general public (R. 3).

32; *People* v. *Gordon*, 71 Cal. App. (2d) 606, 163 P. (2d) 110). A rehearing was denied. Petitioner then petitioned the Supreme Court of California for a hearing which was also denied, although two justices voted that a hearing be granted (R. 5).

Petitioner in the California District Court of Appeal moved to recall its remittitur, alleging among other reasons that the court "in affirming the judgments of conviction did so under a mistake and misapprehension of the actual facts contained in the trial record" (R. 5-6). This motion was summarily denied on the day it came on for hearing, without permitting petitioner to discuss the specifications of misstatement of facts, with the general statement that it is "the policy of the law to put an end to litigation even though a mistake may have been made" (R. 6). Petitioner thereupon applied for a hearing in the Supreme Court of California to review the order denying recall of the remittitur, but the Supreme Court denied a hearing on this petition without opinion (R. 6).

On August 6, 1946, petitioner petitioned the Supreme Court of California for a writ of habeas corpus (R. 6, 31-73), which denied the petition on August 19, 1946, without rendering an opinion or in any way indicating the basis for its denial[4] (R. 7). Thereafter the present proceedings were commenced.[5]

---

[4] There is apparently no claim here that any state remedy other than habeas corpus was available, or that the Supreme Court of California was not the appropriate state forum. The brief below of the respondent makes no such claim, and the opinion of the circuit court of appeals does not consider such a possibility (R. 121-125). Cf. Williams v. Kaiser, 323 U. S. 471, 473, 477.

[5] An application for habeas corpus made when petitioner was incarcerated in the Northern District of California was denied by the United States District Court therein (R. 29-30).

C. The Invalidity Under the Fourteenth Amendment of Petitioner's Imprisonment.

Petitioner's petition for habeas corpus in this proceeding (R. 2-30), as well as his previous application to the California Supreme Court (R. 31-73), states prejudicial denial to him of the due process of law and equal protection of the laws guaranteed by the Fourteenth Amendment, which vitiates the convictions on all eight counts.[6]

In respect of Counts Two to Eight inclusive, the petition states that petitioner was denied the right of appeal accorded generally by the Constitution and laws of California in that the California District Court of Appeal (i) as respects Counts Two to Five inclusive, applied to petitioner evidence expressly excluded as to him (R. 8-9, 35-36), (ii) as respects Counts Six and Seven, assumed testimony not in the record (R. 9-11, 37-39), and (iii) as respects Count Eight, stated that testimony was given by one person when in fact it was given by another, and misstated that certain testimony was corroborated when in fact it was not (R. 11-14, 39-41). The petition alleges that these misstatements deprived petitioner of the benefit of favorable rules of California law,[7] the opportunity of obtaining the California Supreme Court's consideration of review, and accorded petitioner merely the form and not the substance of the right of appeal guaranteed him by the California Constitution and laws (R. 9, 11, 13).

The petition states that the conviction on Count One is likewise void because of denial of the right of appeal, in that the only transactions upon which such conviction could be

---

[6] No hearing having yet been had on the facts alleged in the petition for habeas corpus, such facts must of course be taken as true. But over and above this presumption, it is to be remembered that the facts alleged would here be proved not by self-serving testimony of questionable reliability or accuracy, but by the *written words of the trial transcript* as measured against the *written opinion* of the California District Court of Appeal.

[7] That these favorable rules were of vital and probably controlling importance to petitioner, see *infra*, p. 12.

predicated are the seven transactions involved in the seven counts vitiated for the reasons stated in the preceding paragraph [8] (R. 25-26, 46-48).

The petition further states that the conviction on Count One is also void because it is dependent on a California law which, as here applied, is so vague, indefinite and uncertain as to deny petitioner due process of law (R. 14-18), because the judgment directs a sentence of imprisonment "for the term prescribed by law" (R. 17) and such term was not ascertained and cannot be known (R. 4-5, 15-19) and because irrelevant prejudicial evidence, designed to prejudice petitioner, was admitted over his objection (R. 26-29).

D. Action of the Courts Below.

The district court and circuit court of appeals failed to consider the merits of petitioner's claim, basing their action instead on the ground that petitioner had not exhausted his state remedies because he had not sought certiorari of this Court following the denial of habeas corpus by the Supreme Court of California (R. 88-97, 121-125).[9]

---

[8] As respects Count One, the petition alleges that the right of appeal was denied for the reason, in addition to those expressly set forth in both the California and instant habeas corpus proceedings, that by virtue of the misstatement of facts by the California District Court of Appeal, petitioner was precluded from showing that the California indictment and pre-trial proceedings, considered in their totality, denied him due process and equal protection in failing to inform him of the basis of the conspiracy count and in denying him opportunity of preparing his defense (R. 19-25).

[9] The district judge also referred generally to policies and principles respecting federal interference with state administration of justice (R. 91, 96-97). His view that the writ is available in the federal court only "in rare cases where exceptional circumstances or peculiar urgency are shown to exist" (R. 96) is clearly inapposite where, as here, state remedies have been exhausted. Ex Parte Hawk, 321 U. S. 114, 117-118.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals for the Ninth Circuit erred:

1. In holding that petitioner had not exhausted his state remedies.

2. In failing to consider or pass upon the legal validity of petitioner's claims.

3. In failing to hold that the allegations of petitioner's petition for writ of habeas corpus, if true, require petitioner's discharge.

4. In failing to order that a writ of habeas corpus be granted petitioner.

5. In failing to order that a hearing be had to determine whether the allegations of petitioner's petition for writ of habeas corpus are true.

6. In affirming the order of the district court discharging the order to show cause and denying the petition for writ of habeas corpus.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

I

THE CIRCUIT COURT OF APPEALS HAS DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

The circuit court of appeals held that petitioner had not exhausted his state remdies because, following denial of his petition for habeas corpus in the California Supreme Court, he had not sought certiorari from this Court. In so holding, the circuit court of appeals decided this case in a way in conflict with applicable decisions of this Court.

It is neither necessary nor proper to apply to this Court for a writ of certiorari in order to exhaust state remedies where, as here (R. 7), the highest state court having jurisdiction to issue a writ of habeas corpus which raises federal questions, denies an application therefor without considering and adjudicating its merits and without rendering an

opinion or otherwise indicating the grounds for its denial. *White* v. *Ragen*, 324 U. S. 760; cf. *House* v. *Mayo*, 324 U. S. 42; *Woods* v. *Nierstheimer*, 328 U. S. 211; see *Lynch* v. *New York*, 293 U. S. 52, 54.

Petitioner's petition for habeas corpus to the California Supreme Court relied on both federal and state grounds (R. 31-73). It was denied without opinion or any indication of the basis of denial (R. 7). Following such denial, it was neither necessary nor appropriate to petition this Court for certiorari, and the court below has therefore decided this case directly contrary to controlling decisions of this Court.[10]

---

[10] It is submitted that the basic fallacy underlying the conclusion by the court below that petitioner did not exhaust his state remedies, is its assumption that because federal questions were *presented* to the state court such court *necessarily decided* such questions and predicated its judgment thereon. The logical conclusion of such assumption is that, to exhaust state remedies, a party must *always* seek certiorari of this Court following denial of a petition presenting federal claims in a state proceeding. This assumption is therefore directly at variance with the basic philosophy of this Court's review of state cases—that, to justify review by this Court, it must *appear affirmatively from the record*, that a federal question was actually decided. " . . . jurisdiction cannot be founded upon surmise." See Lynch v. New York, 293 U. S. 52, 54. Such assumption would seem to place the Ninth Circuit essentially in conflict with the Seventh Circuit. Cf. Potter v. Dowd, (C. C. A. 7) 146 F. (2d) 244, where failure to petition for certiorari before proceeding in federal court was excused because of the personal circumstances of the petitioner. That the circuit court of appeals' assumption is here as groundless factually as it is untenable legally, appears from consideration of the possible state grounds upon which the California Supreme Court may have acted. For example, it may have denied the petition on the state ground that under the circumstances it would not go behind that judgment, Ex Parte Hickey, 3 Cal. App. (2d) 502, 39 P. (2d) 869, or because as a matter of state law the attack here is not considered "extrinsic to the record," Ex Parte Mooney, 6 Cal. App. (2d) 730, 45 P. (2d) 388; cf. Ex Parte Mooney, 10 Cal. (2d) 1, 73 P. (2d) 554, or because the invalidity here did not appear "upon the face of the judgment," Ex Parte Murphy, 79 Cal. App. 64, 248 Pac. 1044.

II

Constitutional Questions of Grave Importance are Presented.

A. California, in violation of the Fourteenth Amendment, denied petitioner his right of appeal.

The right of appeal is an integral part of the legal process of California (R. 75-76). In *Wuest* v. *Wuest*, 53 Cal. App. (2d) 339, 345, 127 P. (2d) 934, 936, it was said:

> "The right of appeal is as sacred and inviolable as the right to a trial, and when by judicial oppression such right is violated or vitiated, the guaranteed and substantial rights of a party have been materially affected thereby."

Petitioner under the California Constitution and laws had the absolute right of appeal to the district court of appeal, California Constitution, Article VI, Section 4b; California Penal Code, Section 1237; Appendix, *infra*, pp. 16-17, and the right to a hearing in the Supreme Court in the event that his case was "ordered by the Supreme Court to be transferred to itself for hearing and decision" California Constitution, Article VI, Section 4, Appendix, *infra*, p. 16.

California discriminatively has denied the substance of the right of appeal to petitioner, in violation of the due process of law and the equal protection of the laws.

The palpable and patent misstatements of facts by the district court of appeal, whereby evidence excluded as to petitioner was applied to him, testimony not in the record was assumed, testimony given by one was attributed to another and testimony not corroborated was misstated to have been corroborated[11] (R. 8-14, 35-41), denied petitioner the benefit of important favorable California rules, and of the opportunity of a hearing in the California Supreme Court[12] by virtue of its rule that it will not go behind

---

[11] See *infra*, pp. 6-7.

[12] Petitioner's confinement having resulted from the district court of appeal's affirmance which was predicated on these misstatements,

the statement of facts contained in an opinion of a district court of appeal if the opinion contains a correct statement of the law based upon the facts contained therein[13] (R. 9, 33-34, 78). It is therefore submitted that the California proceedings, considered in their totality, denied appeal in violation of the Fourteenth Amendment.

The right of appeal, when integrated by a state into its legal process, cannot, consistently with the Fourteenth Amendment, be arbitrarily withheld from a particular defendant or unreasonably or discriminatively curtailed. *Cochran* v. *Kansas*, 316 U. S. 255; cf. *Boykin* v. *Huff*, (App. D. C.) 121 F. (2d) 865, 872.

"Equal protection of the laws" requires "that all persons . . . should have like access to the courts of the country for the protection of their persons." *Barbier* v. *Connolly*, 113 U. S. 27, 31. Here, petitioner was accorded merely the form and not the substance of the right of review, and this

---

such misstatements, of themselves, would seem to have resulted in confinement in violation of the Fourteenth Amendment, especially since it is the law in California that a decision of an appellate court which is based on a misstatement or omission of material facts is a nullity (R. 54-55, 75-76). We do not here have a case of mere error on appeal. However, petitioner here emphasizes not only the misstatements but the ultimate results produced by their operation in *conjunction with* California appellate procedure. See n. 13, *infra*.

[13] Although one of California's judges has said of this rule, "Since the adoption of the above-mentioned procedural policy, grave doubt has arisen in the minds of many members of the legal profession and I daresay of some of the members of this Court, as to whether such policy has not been the means of grave injustice being done to litigants in numerous cases because of the failure of some District Courts of Appeal to furnish a correct statement of facts in their opinions which come before this Court for review." (R. 79), it is not the rule *per se*, but its operation in a situation where, as here, the district court of appeal has made palpable and patent misstatements, that petitioner emphasizes as resulting in confinement in violation of the Fourteenth Amendment.

discrimination [14] denied him the equal protection of the laws.[15]

Further, the arbitrary deprivation, as here, of the substance of the right of appeal denies due process. See *State* v. *Guerringer*, 265 Mo. 408, 416-417, 178 S. W. 65, 67; *Wuest* v. *Wuest, supra; Ex Parte Sharp,* (D. C. Kansas) 33 Fed. Supp. 464.

That severe prejudice resulted to petitioner from the discriminatory denial of the substance of appeal is clear: such denial deprived petitioner of the benefits of the California rules that evidence which has been excluded as to a particular defendant cannot be considered against him (R. 9, 79-80), that no person can be convicted of the crime of defrauding by means of a false pretense unless there is corroboration, and that such a crime cannot be predicated upon an alleged misrepresentation not testified to by the victim [16] (R. 13, 57, 80-82). Such discriminatory denial of appeal does not meet the tests of the Fourteenth Amendment.[17]

---

[14] To establish the discrimination, it is not necessary for petitioner to show that others were given what he was denied because, in the absence of proof to the contrary, it is presumed that the laws of the state are properly administered. Utah Power & Light Co. v. Pfost, 286 U. S. 165, 190.

[15] As was said in petitioner's brief in Cochran v. Kansas, *supra*, it "seems unnecessary to seek to fit the discrimination here alleged precisely into any of the categories recognized in the cases. Whether their discriminatory acts be deemed 'invidious', Soon Hing v. Crowley, 113 U. S. 703, 708 (1885), or 'unjust and illegal', Yick Wo v. Hopkins, 118 U. S. 356, 374 (1866), or 'intentional and arbitrary', Sunday Lake Iron Co. v. Wakefield, 247 U. S. 350, 352 (1918)," (p. 26), the final result was to deny petitioner the substance of his right of appeal.

[16] It seems clear that these rules might well have been of controlling importance. It is to be remembered that the right of appeal was denied in respect of all eight counts. See *supra*, pp. 6-7.

[17] It is of course clear that the right of appeal as here denied could not have been vindicated in the very proceeding in which it was wrongfully denied; necessarily, it must be vindicated in a collateral attack, here, habeas corpus. Cf. Cochran v. Kansas, 316 U. S. 255.

B. CALIFORNIA OTHERWISE VIOLATED THE FOURTEENTH AMENDMENT.

Count One having alleged conjunctively violations of all the clauses of the paragraphs of the statute[18] relied upon (R. 15, 20), and the verdict on Count One having been a general one (R. 15), in consequence of which it is impossible to exclude any clause stated in the Count as one upon which the jury might have relied, it necessarily follows that the conviction must fall if any clause is void. *Stromberg* v. *California,* 283 U. S. 359; *Williams* v. *North Carolina,* 317 U. S. 287, 292; *Cramer* v. *United States,* 325 U. S. 1, 36. One of such clauses, "To cheat and defraud any person of any property, by any means which are in themselves criminal," as here applied is so vague, indefinite and uncertain as to be violative of due process, especially where, as here, there is nothing else in the state law to give the expression meaning (R. 14-15), and where, as here, there was not even an attempt to tell the jury what it means (R. 17). *Connally* v. *General Const. Co.,* 269 U. S. 385; *Lanzetta* v. *New Jersey,* 306 U. S. 451; *Stoutenburgh* v. *Frazier,* 16 App. D. C. 229.

Moreover, there having been no ascertainment of, and it being impossible judicially to know, which of the clauses of Count One the jury relied upon in convicting (R. 15-19), and the permissible punishment varying, depending upon the clause relied upon, from (i) a minimum of one year and a maximum of ten years to (ii) a minimum of six months and a maximum of two years[19] (R. 4-5, 16), it was impos-

---

[18] Sec. 182, paragraphs 1 and 4, California Penal Code, Appendix, *infra,* pp. 17-18. Note that paragraph 4, which contains three of the clauses relied on in Count One, is in the disjunctive. See n. 2, p. 4, *supra.*

[19] Two of the clauses of Count One, "to obtain money and property by false pretenses" and "to commit grand theft" (R. 15, 20), carry sentences of not less than one nor more than ten years by virtue of California Penal Code, Secs. 182, 484, and 489, considered together (R. 4-5, 16). The other two clauses of Count One, "to cheat and defraud by criminal means" and "[to obtain money and property] by false promises, with fraudulent intent not to perform

sible, consistently with due process and equal protection, to impose on the basis of the general verdict here rendered on Count One (R. 15), the sentence actually imposed, that petitioner "be punished by imprisonment in the State Prison **for the term prescribed by law**" (R. 17). Under these circumstances, the "term prescribed by law" cannot be known, and the sentence is void.[20] Cf. *Smith* v. *United States*, (C. C. A. 10) 145 F. (2d) 643, cert. denied 323 U. S. 803.

Lastly, it would seem that the introduction of prejudicial irrelevant evidence, designed to prejudice, as here (R. 27), violates due process. Cf. *Mooney* v. *Holohan*, 294 U. S. 103; *Hysler* v. *Florida*, 315 U. S. 411, 413.

The vital importance of these Constitutional questions need not be labored in view of the solicitude of this Court for the preservation of the fundamentals of due process and equal protection. Judges of the United States cannot, consistently with the Constitution, avoid passing upon these questions where, as here, they are raised in an appropriate proceeding. Cf. *Moore* v. *Dempsey*, 261 U. S. 86, 92 (opinion by Mr. Justice Holmes).

---

such promises" (R. 15, 20), not being substantive offenses in California (R. 16), carry sentences of not less than six months nor more than two years by virtue of California Penal Code, Secs. 18a and 182, considered together (R. 4-5, 16). The Penal Code sections primarily involved in this case appear in the Appendix, *infra*, pp. 17-18.

[20] The fact that in California not the court, but the Adult Authority, a non-judicial body, fixes the sentence within the limits of the prescribed minimum and maximum, would seem to accentuate this conclusion. In any event, the fact that the actual sentence is fixed by a non-judicial body cannot relieve the state from the obligation of complying with due process in ascertaining the offense for which sentence is to be fixed.

CONCLUSION

Wherefore it is respectfully requested that this petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit be granted.

DAVID W. LOUISELL,
Washington, D. C.,
Counsel for Petitioner.

SPENCER & LOUISELL
Washington, D. C.
Of Counsel.

October, 1947.

APPENDIX

California Constitutional Provisions.

Article VI, Section 4:

> The Supreme Court shall have appellate jurisdiction on appeal from the Superior Courts in all cases in equity, except such as arise in Municipal or Justices' Courts; also, in all cases at law which involve the title or possession of real estate, or the legality of any tax, impost, assessment, toll, or municipal fine; also, in all such probate matters as may be provided by law; also, on questions of law alone, in all criminal cases where judgment of death has been rendered; *the said court shall also have appellate jurisdiction in all cases, matters and proceedings pending before a District Court of Appeal, which shall be ordered by the Supreme Court to be transferred to itself for hearing and decision, as hereinafter provided.* The said court shall also have power to issue writs of mandamus, certiorari, prohibition, and habeas corpus, and all other writs necessary or proper to the complete exercise of its appellate jurisdiction. Each of the justices shall have power to issue writs of habeas corpus to any part of the State, upon petition by or on behalf of any person held in actual custody, and may make such writs returnable before himself or the Supreme Court or before any District Court of Appeal, or before any justice thereof, or before any Superior Court in the State, or before any judge thereof. (Italics added)

Article VI, Section 4b:

> The District Courts of Appeal shall have appellate jurisdiction on appeal from the Superior Courts (except in cases in which appellate jurisdiction is given to the Supreme Court) in all cases at law in which the Superior Courts are given original jurisdiction; also, in all cases of forcible or unlawful entry or detainer (except such as arise in Municipal, or in Justices' or other inferior courts); in proceedings in insolvency; in actions to prevent or abate a nuisance; in proceedings of mandamus, certiorari, prohibition, usurpation of office, removal from office, contesting elections, eminent domain, and in such other special proceedings as

may be provided by law; *also, on questions of law alone, in all criminal cases prosecuted by indictment or information,* except where judgment of death has been rendered.

The said Courts shall also have appellate jurisdiction in all cases, matters, and proceedings pending before the Supreme Court which shall be ordered by the Supreme Court to be transferred to a District Court of Appeal for hearing and decision. The said courts shall also have power to issue writs of mandamus, certiorari, prohibition and habeas corpus, and all other writs necessary or proper to the complete exercise of their appellate jurisdiction. Each of the Justices thereof shall have power to issue writs of habeas corpus to any part of his appellate district upon petition by or on behalf of any person held in actual custody, and may make such writs returnable before himself or the District Court of Appeal of his district, or before any Superior Court within his district, or before any Judge thereof. (Italics added)

Statutes

Penal Code Of California.

Section 1237:

An appeal may be taken by the defendant:

1. From a final judgment of conviction;

2. From an order denying a motion for a new trial;

3. From any order made after judgment, affecting the substantial rights of the party. (Enacted 1872.)

Section 182*:

If two or more persons conspire:

1. To commit any crime;

2. Falsely and maliciously to indict another for any crime, or to procure another to be charged or arrested for any crime;

---

*This section was amended in 1943 but the statute as here printed, and not as amended, is applicable in this case.

3. Falsely to move or maintain any suit, action or proceeding;

4. To cheat and defraud any person of any property, by any means which are in themselves criminal, or to obtain money or property by false pretenses or by false promises with fraudulent intent not to perform such promises;

5. To commit any act injurious to the public health, to public morals, or to pervert or obstruct justice, or the due administration of the laws.

They are punishable as follows:

When they conspire to commit any felony, or to commit any act injurious to the public health, or to public morals, or tending to pervert or obstruct justice, or the due administration of the laws, they shall be punishable in the same manner and to the same extent as in this code provided for the punishment of the commission of the said felony or act, respectively.

When they conspire to do any of the other acts described in this section they shall be punishable by imprisonment in the county jail or state penitentiary not exceeding two years, or by a fine not exceeding five thousand dollars, or both, and cases of such conspiracy may be prosecuted and tried in the superior court of any county in which any overt act tending to effect such conspiracy shall be done. (Enacted 1872; Am. Code Amdts. 1873-74, p. 426; Stats. 1919, p. 170.)

Section 489:

Grand theft is punishable by imprisonment in the state prison for not less than one nor more than ten years. (Enacted 1872; Am. Stats. 1927, p. 1047.)